

Till Death Do Us Part: *Obergefell v. Kasich* and the Reconciliation of Patchwork Extra-jurisdictional Same-Sex Marriage Laws

JOSHUA SNOWDEN*

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I. INTRODUCTION

Those five words—“till death do us part”—take on a palpable meaning for John Obergefell and David Michener, two plaintiffs in *Obergefell v. Kasich*.¹ Following the U.S. Supreme Court’s decision to strike down Section 3 of the Defense of Marriage Act (DOMA)² in *United States v. Windsor*,³ *Obergefell* will help resolve the interplay of Section 2 of DOMA⁴ and the Full Faith and Credit Clause (FFCC).⁵ In addition to challenging Ohio’s ban on same-sex

*J.D. Candidate, The Ohio State University Moritz College of Law, expected 2014; M.H.A. Candidate, The Ohio State University College of Public Health, expected 2014; B.A. in Political Science, Missouri State University, 2010. I would like to thank Professor Ruth Colker for her guidance and feedback.

¹No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013).

²Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA Section 3 provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7 (2012).

³133 S. Ct. 2675, 2695–96 (2013) (“DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”).

⁴Section 2 of DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2006 & Supp. 2011).

⁵“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1.

marriage and demonstrating how courts can reconcile *Windsor*'s narrow holding with its sweeping rhetoric,⁶ it will encourage states to recognize extra-jurisdictional same-sex marriages under the Fourteenth Amendment.

II. *OBERGEFELL V. KASICH*

Cincinnatians James Obergefell and John Arthur cohabitated in a committed relationship for twenty years. Arthur's death was imminent because of progressive amyotrophic lateral sclerosis, and he received hospice care. The couple chartered a medically equipped plane to Maryland⁷ on July 11, 2013, where they married on the tarmac of a Baltimore airport.⁸ Arthur passed away on October 22, 2013, at age forty-eight.⁹

Obergefell sued the State of Ohio, seeking an order declaring Ohio laws forbidding recognition of extra-jurisdictional same-sex marriages in part unconstitutional.¹⁰ Judge Black granted injunctive relief through December 31, 2013, with oral arguments heard on December 18 to assess issuing a permanent order.¹¹ Meanwhile, David Michener, whose husband William Herbert Ives unexpectedly died after the couple wed in Delaware on July 22, successfully petitioned for comparable injunctive relief and joined the suit.¹² Michener's addition proves consequential because his preliminary injunction is more permanent, the state will not appeal the order,¹³ and the couple adopted three

⁶ Compare 133 S. Ct. at 2694 ("The principal purpose [of DOMA] is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their States, but not other couples, of both rights and responsibilities."), with *id.* at 2696 ("This opinion and its holding are confined to those lawful marriages."), and *id.* at 2697 (Roberts, C.J., dissenting) ("We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples. That issue, however, is not before us in this case . . .").

⁷ Same-sex marriage has been legal in Maryland since January 1, 2013. See *infra* note 21.

⁸ Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262, at *1–2 (S.D. Ohio July 22, 2013). For Ohio's constitutional prohibition on same-sex marriage, see *infra* note 22.

⁹ See John Arthur, *Man Who Challenged Ohio's Gay Marriage Ban, Dies at 48*, N.Y. DAILY NEWS (Oct. 22, 2013, 12:54 PM), <http://www.nydailynews.com/news/national/john-arthur-pro-gay-marriage-activist-dies-48-article-1.1492793>.

¹⁰ Obergefell, 2013 WL 3814262, at *2. Obergefell further petitioned that state officials record Arthur as "married" and Obergefell as his "surviving spouse" on Ohio death certificates upon Arthur's death. *Id.*

¹¹ See Temporary Restraining Order, Obergefell, No. 1:13-cv-501, ECF No. 14; Order of Extension of the Temporary Restraining Order, Obergefell, No. 1:13-cv-501, ECF No. 19; Minute Entry of Dec 18, 2013, Obergefell, No. 1:13-cv-501.

¹² See Motion for Temporary Restraining Order *Re* David Michener at 1, Obergefell, No. 1:13-cv-501, ECF No. 21 [hereinafter Motion Michener].

¹³ Chris Geidner, *Ohio Attorney General Has No Plans To Appeal Temporary Restraining Order in Gay Couple's Case*, BUZZFEED POL. (July 25, 2013, 8:33 PM), <http://www.buzzfeed.com/chrisgeidner/ohio-attorney-general-has-no-plans-to-appeal->

children prior to marrying.¹⁴ Black subsequently permitted the plaintiffs to expand the complaint to include all similarly situated couples.¹⁵

In granting injunctive relief, Judge Black conjectured that Ohio's refusal to recognize out-of-state same-sex marriages likely violates the Equal Protection Clause (EPC).¹⁶ Citing prominent U.S. Supreme Court marriage¹⁷ and gay rights precedent,¹⁸ Black concluded that "[t]he purpose served by treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor* and in *Romer v. Evans*: 'to impose inequality' and to make gay citizens unequal under the law."¹⁹

III. EXTRA-JURISDICTIONAL SAME-SEX MARRIAGES UNDER THE FOURTEENTH AMENDMENT

The law has historically regarded marriage as a state law issue.²⁰ The decentralization of the institution creates a state-by-state patchwork of marriage laws: seventeen states recognize same-sex marriage,²¹ yet Ohio remains among the states that ban same-sex marriage.²²

temporary-restr ("[D]espite a report claiming that Attorney General Mike DeWine would be appealing the Monday order from Judge Timothy Black, no such appeal is planned.").

¹⁴ See Motion Michener, *supra* note 12, at 1.

¹⁵ See Amended Complaint (Second), *Obergefell*, No. 1:13-cv-501, ECF No. 33; see also Amanda Lee Myers, *Ohio Gay Marriage Lawsuit Expanded to Others*, USA TODAY (Sept. 25, 2013, 1:01 PM), <http://www.usatoday.com/story/news/nation/2013/09/25/ohio-gay-marriage-lawsuit/2869007/> (commenting how expansion triggered opponents of gay marriage like Ohio state Representative John Becker to call for Judge Black's impeachment).

¹⁶ *Obergefell*, 2013 WL 3814262, at *1.

¹⁷ E.g., *Windsor v. United States*, 133 S. Ct. 2675 (2013); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (restricting marriage of persons owing child support violates equal protection); *Loving v. Virginia*, 388 U.S. 1 (1967) (forbidding inter-racial marriage violates due process and equal protection).

¹⁸ *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a Colorado state constitutional amendment prohibiting special protections for gay people violates equal protection under rational basis test).

¹⁹ *Obergefell*, 2013 WL 3814262, at *6 (citing *Windsor*, 133 S. Ct. at 2694; *Romer*, 517 U.S. at 635–36).

²⁰ See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States."); *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . .").

²¹ Currently, same-sex couples can marry in California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New Jersey, New York, Rhode Island, Vermont, and Washington. See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriages*, NAT'L CONF. ST. LEGISLATURES (Jan. 7, 2014) [hereinafter *NCSL*], <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>. Even though the same-sex marriage law in Illinois does not take effect until June 1, 2014, same-sex couples can now get married if one partner faces a life-threatening illness. See Kim Geiger, *Court OKs Same-Sex Marriage*

In fact, Ohio's limitations on same-sex couples' rights are among the most extreme in the country. In addition to constitutionally proscribing the recognition of same-sex marriages, Ohio is one of five states that preclude same-sex partners from jointly adopting children.²³ Ohio's unusually disparate treatment of opposite- and same-sex couples makes the state ripe for Fourteenth Amendment scrutiny.

Judge Black's opinion falters in its Fourteenth Amendment analysis. While Black's preliminary opinion does not explicitly challenge the constitutionality of DOMA's Section 2, recognizing an extra-jurisdictional same-sex marriage necessarily leads to that conclusion. However, Section 2, which grants states discretion to not recognize out-of-state same-sex marriages, might not have independent legal significance. The FFCC already permits a forum state to ignore another state's public law that strongly violates its own public policies.²⁴

Licenses Now for Couples Facing Life-Threatening Illness, CHI. TRIB. (Dec. 16, 2013, 6:00 PM), <http://www.chicagotribune.com/news/local/breaking/chi-court-orders-samesex-marriage-licenses-to-couples-facing-lifethreatening-illness-20131216,0,792170.story>. Same-sex marriage is also legal in the District of Columbia, *see NCSL, supra*, and within two Native American tribes, *see Coquille Tribal Regulation*, ch. 741.010 3.b (2009), *available at* <http://www.coquilletribe.org/docbin/741MarriageRegulation.pdf>; William Yardley, *A Washington State Indian Tribe Approves Same-Sex Marriage*, N.Y. TIMES, Aug. 11, 2011, at A12 (discussing how the Washington Suquamish Tribe unanimously approved same-sex marriage). Additionally, Oregon, Nevada, Colorado, and Illinois offer civil unions that afford state-level rights and responsibilities equal to the states' respective marriage rights and responsibilities. *See NCSL, supra*.

²²Ohio does not grant or recognize same-sex marriages under its constitution. OHIO CONST. art. XV, § 11 ("Only a union between one man and one woman may be a marriage valid in or *recognized* by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." (emphasis added)). Twenty-eight additional states have constitutional provisions restricting marriage to one man and one woman. These include: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *See NCSL, supra* note 21. At the time of publication, same-sex marriage might also be permitted in Utah. *See Utah's Gay Marriage Ban Back in Court*, HUFFINGTON POST (Dec. 23, 2013, 8:18 AM), http://www.huffingtonpost.com/2013/12/23/utah-gay-marriage_n_4492447.html. Indiana, Pennsylvania, West Virginia, and Wyoming have only statutory provisions banning same-sex marriage. *See NCSL, supra* note 21.

²³While no Ohio law directly bans second-parent adoption, Ohio courts have not protected parental rights of same-sex partners. *See In re Bonfield*, 780 N.E.2d 241, 247 (Ohio 2002) (concluding that even though a biological mother has a constitutional right over her child's care, she and her lesbian partner are "not entitled to the benefit of statutes that are clearly inapplicable to such a familial arrangement"); *see also Parenting Laws: Joint Adoption*, HUM. RTS. CAMPAIGN, http://www.hrc.org/files/assets/resources/parenting_joint-adoption_082013.pdf (last updated Aug. 2, 2013).

²⁴U.S. CONST. art. IV, § 1 ("And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."); *see, e.g., Nevada v. Hall*, 440 U.S. 410, 422 (1979) ("[T]he Full Faith and Credit

A court may recognize a public policy exception to another state's laws but not to its judgments.²⁵ Practically speaking, this dichotomy means striking down Section 2 of DOMA would require Ohio to recognize married same-sex couples' divorces and adoptions, the product of judicial proceedings. State bans on lawfully married same-sex partner adoptions would fail to pass constitutional muster. Marriages constitute public records, however, not judgments. Ohio and non-same-sex recognizing states could thus continue ignoring extra-jurisdictional marriages under the FFCC public policy exception because the states' laws demonstrate a pronounced policy against same-sex marriage.²⁶

Extra-jurisdictional same-sex marriages could be legal if *Obergefell* goes beyond the Section 2 constitutionality argument to address the broader Fourteenth Amendment question about limiting the rights of same-sex partners. Judge Black intertwines both the EPC and Due Process Clause (DPC) frameworks. He contends Ohio's scheme creating "two tiers of couples"²⁷ "infringe[s] on important liberty interests around marriage and intimate relations."²⁸

The Court has long regarded a right to marry as a fundamental due process right.²⁹ Even though the Court explicitly denied that due process requires the government to "give formal recognition to any relationship that homosexual persons seek to enter,"³⁰ language in its opinions legitimizes same-sex relationships as important liberty interests.³¹

Clause does not require a State to apply another State's law in violation of its own legitimate public policy.").

²⁵ See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (citing *Hall*, 440 U.S. at 421–24; *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

²⁶ See *In re Bicknell*, 771 N.E.2d 846, 849 (Ohio 2002) (holding that a woman can legally change her name to that of her lesbian partner's because the couple was not trying "to create the appearance of a state-sanctioned marriage"); *id.* (Lundberg, J., dissenting) ("Allowing unmarried couples, whether homosexual or heterosexual, to legally assume the same last name with the stamp of state approval is directly contrary to the state's position against same-sex and common-law marriages, neither of which Ohio recognizes.").

²⁷ *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *3 (S.D. Ohio July 22, 2013).

²⁸ *Id.* at *4.

²⁹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383–84 (1978); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

³⁰ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). But see *id.* at 579 (O'Connor, J., concurring) (deciding the case based on the Equal Protection Clause).

³¹ *Id.* at 573–74 (majority opinion) ("[T]he substantive force of the liberty protected by the Due Process Clause . . . confirm[s] that our laws and tradition afford constitutional protection to personal decisions relating to marriage, . . . family relationships, child rearing These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992))).

Aside from the right to marry, the right to remain married carries its own due process liberty interests.³² Married partners maintain interests in stability after migrating from their marriage's place of celebration. The due process argument proves more persuasive when a couple does not flaunt its own state's ban on same-sex marriage to marry elsewhere, seeking marriage's benefits through the recognition back door.³³ Here, Obergefell and Michener's state hopscotch cuts against the stability argument. Still, "[t]he fact that the parties to a marriage left the state to marry in order to evade Ohio's marriage laws is immaterial to the marriage's validity in Ohio."³⁴

Equal protection also applies because no avowed governmental purpose justifies the creation of two tiers of couples. Opposite-sex couples can leave the state to marry, immediately return, and have their marriages acknowledged. Same-sex couples cannot. The state honors other marriages illegal to perform intrastate, such as those between first cousins and minors.³⁵ Same-sex married couples are thus treated differently than opposite-sex married couples without legitimate purpose.³⁶ If given more bite in the same-sex marriage context, the EPC would prohibit such intrastate discrimination.

³² See Steve Sanders, *The Constitutional Right To (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1452 (2012) ("[B]y acknowledging the difference between marriage creation and marriage recognition, we can appreciate the harm that nonrecognition laws inflict and why states should be required to justify that harm as necessary to significantly advancing an important interest.").

³³ For example, consider a Massachusetts gay couple that married in their home state in 2004. Intending to permanently reside in Massachusetts, they established joint financial responsibilities. If an employment prospect sends the couple to Ohio, they have a greater due process expectation in Ohio recognizing their marriage.

³⁴ *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *5 (S.D. Ohio July 22, 2013) (citing 45 OHIO JUR. 3d FAMILY LAW § 11); see also *Courtright v. Courtright*, 11 Ohio Dec. Reprint 413, 414, 26 W.L.B. 309 (Ct. Com. Pl. Ohio 1891), *aff'd without opinion*, 53 Ohio 685 (1895) (An Ohio couple that leaves the state "for the purpose of becoming married in another state, and in accordance with its laws, intending to immediately return and continue their residence in this state, and such purpose and intention is carried out, the marriage thus consummated, can not be set aside, either because it was contracted in accordance with the laws of this state, or because the parties went out of the state *for the purpose of evading the laws of this state* upon that subject." (emphasis added)).

³⁵ *Obergefell*, 2013 WL 3814262, at *5 (citing *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958); *Hardin v. Davis*, 16 Ohio Supp. 19, at *22 (Ct. Com. Pl. Hamilton Cnty. May 18, 1945)).

³⁶ Assuming *arguendo* that the State of Ohio could provide a rational purpose for treating same-sex couples legally married in other states differently, Judge Black posited that these couples still garner "the highest level of protection under the First Amendment right of association." *Obergefell*, 2013 WL 3814262, at *6 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)). Technically, the First Amendment does not apply against state actors and is only implicated in the Fourteenth Amendment analysis to the extent of incorporation. *Cf. Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (holding Minnesota's attempts to eliminate gender-based discrimination violate "the First Amendment[']s . . . corresponding right to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends"). Moreover, case law actually cuts against Black's position. The

IV. CONCLUSION

Like dominoes collapsing, the number of states banning same-sex marriage has fallen from forty-eight to thirty-three in four years.³⁷ Given the reasoning in Judge Black's order, it seems *Obergefell* will lead Ohio along a similar trajectory. Based on oral arguments heard on December 18, 2013,³⁸ although the holding in Black's decision will be narrow,³⁹ its language may have sweeping pro-same-sex marriage reasoning.⁴⁰ Thus at a minimum, *Obergefell* will provide a roadmap for other states to extricate themselves from the legal contradictions of recognizing marriages illegal when performed there but legal when performed elsewhere. It has the potential, however, to serve as a springboard to invalidate a state's power to ban same-sex marriage, reconciling the existing patchwork of state same-sex marriage laws. If courts throughout the country build on *Obergefell*'s projected framework, the *Obergefells* and *Micheners* in those jurisdictions may soon similarly solemnize their relationships with the classic vow, "till death do us part."

right to association typically applies to a group's ability to exclude members who would disrupt its internal cohesion. Guided by this provision, the Court has permitted the Boy Scouts of America to exclude known homosexuals from leadership roles, *see* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000), and a Massachusetts privately organized Irish parade to exclude a lesbian, gay, and bisexual (LGB) affinity group, *see* *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 569–70 (1995). Furthermore, the Court prohibited law schools from restricting military recruiters' presence on their campuses because of the schools' opposition to the Don't Ask, Don't Tell policy. *See* *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 60, 67 (2006). Of note, the Court's right of association precedents rule against LBG-friendly practices.

³⁷ *See supra* notes 20–21 and accompanying text.

³⁸ Minute Entry of Dec. 18, 2013, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013).

³⁹ Judge Black's opinion may only recognize same-sex marriages on Ohio death certificates, *see* Amanda Lee Myers, *Federal Judge Weighing Ohio Gay Marriage Fight*, COLUMBUS DISPATCH (Dec. 18, 2013, 5:15 AM), <http://www.dispatch.com/content/stories/local/2013/12/18/1218-Federal-judge-weighing-Ohio-gay-marriage-fight.html> ("Black's decision . . . only will pertain to the recognition of gay marriage on Ohio death certificates."); or may recognize them in additional contexts, *see* Amber Hunt, *Judge: Expect Ruling Soon in Gay Marriage Case*, NEWARKADVOCATE.COM (Dec. 19, 2013), <http://www.newarkadvocate.com/article/20131218/NEWS01/312180066/Judge-Expect-ruling-soon-gay-marriage-case> (A ruling in favor of plaintiffs would "potentially ensur[e] that gay marriages performed legally in other states would be recognized—at least in death—in Ohio.").

⁴⁰ *See* Hunt, *supra* note 39 (During oral arguments, Judge Black posited: "If the Supreme Court said that the federal government cannot fail to recognize valid same-sex marriages, why in heaven's name can the states?").